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by
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The role of the class representative in class actions has become something of an enigma. On a doctrinal level, the Supreme Court at times has treated the named plaintiff as the pivotal figure in the class lawsuit, with the fate of the entire action rising or falling with the status of the representative. Yet, at other times the Court in effect has reduced the representative to nothing more than a figurehead with little or no function. On a practical level, both courts and commentators increasingly acknowledge that the latter view is closer to reality: the named plaintiff plays almost no role in the actual prosecution of the class action, leaving this function for the class attorney.

The time has come to ask a fundamental question: Do we really need the class representative—the named plaintiff—in a class action?[1] Ironically, while veritable volumes have been written about the class action,[2] this basic question has never been raised. To find an answer, two related inquiries must be addressed: (1) Is the class representative serving any useful doctrinal or practical function? (2) If not, is his presence doing any harm? This Article suggests that the class representative serves no useful purpose and that we would be better off without him.

Some skeptics, no doubt, will respond quickly that this is a far-fetched, radical notion that would require rewriting Rule 23 of the Federal Rules of Civil Procedure (Rule 23) and restructuring the entire class action practice. This Article explains that only modest changes would be required in Rule 23. Critics should note that we are only

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1. Professor Willborn, for instance, has stated: "Under Rule 23 . . . a class action without a class representative is like one hand clapping. The concept simply is not contemplated by the Rule." Willborn, *Personal Stake, Rule 23, and the Employment Discrimination Class Action,* 22 B.C.L. REV. 1, 1-2 (1980).

2. No attempt will be made in this Article to catalogue all the numerous books and articles written about the class action. The treatises include: 3B J. MOORE, FEDERAL PRACTICE (2d ed. 1987); 1 H. NEWBERG, CLASS ACTIONS (2d ed. 1985); 7A-C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D (1986); S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

talking about a rule of procedure, not a holy writ handed down unchanged from one generation to the next. Congress and the states have seen fit to amend even the United States Constitution.[3] Furthermore, the proposal made here would not require major changes in either class action doctrine or practice. To the contrary, the class representative has been eliminated already from much class action doctrine and plays little role in practice. Indeed, this Article contends that not only does the class representative serve no useful function, but, moreover, class actions would *benefit* from eliminating the named plaintiff. The benefits are threefold: first, eliminating the class representative will help bring much-needed consistency to class action jurisprudence; second, it will encourage courts to direct their attention toward the real problems associated with class litigation; and third, it will eliminate a number of phantom issues on which courts and litigants currently waste an inordinate amount of time.

Given the novelty of this proposal, I have tried to anticipate the questions and retorts of "the skeptic." Part I answers the skeptic's first question: Why should we even consider tampering with the class representative? The class action seems to be operating quite nicely, and "if it ain't broke, why fix it?" Part I explains that although the class action may be functioning, there is still considerable room for improvement. The class representative in particular is "broken" on both a doctrinal and a practical level. Doctrinally, the class representative has taken on a "now-you-see-him, now-you-don't" aura: at times his presence and his individual claim are regarded as central to the continuation of the lawsuit; yet, at other times his status and the status of his individual claim are wholly ignored. In practice, he has been reduced to little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions. Part II of the Ar-

3. Nonetheless, some commentators are firmly against making any changes beyond "fine tuning" to Rule 23. *See* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 682-93 (1979). Other commentators have proposed modifying Rule 23 to make it more useful in mass tort cases. *See, e.g.*, Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 625-26 (1987) [hereinafter Coffee, *Rethinking the Class Action*] (summarizing the various proposals that have been made); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Nielson, *Was the 1966 Advisory Committee Right? Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988). An American Bar Association committee also has put forward suggestions for revising Rule 23. *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 AM. B. FOUND. RES. J. 195 (1986). None of these proposals, however, deals with the question posed in this Article: Should we eliminate the class representative?

ticle explores how these problems can be solved if the class representative is eliminated. Not only can class action jurisprudence be made consistent and coherent, but additionally by eliminating the class representative a court is confronted with reality: the class action is not simply a large traditional lawsuit, but rather is group litigation with problems and concerns different from those in the traditional two-party lawsuit. Additionally, without a class representative, the court will avoid wasting its time and efforts on phantom issues that arise solely because Rule 23 tries to force the class action into the traditional bipolar litigation model through the class representative. Finally, Part III sets out a summary of the proposal. In brief, the proposal is to eliminate the class representative and treat the class as the real party to the lawsuit. All standing and mootness issues would be decided by reference to the status of the class's claim, not the status of one individual's claim. To insure that the class claim was a concrete, contested issue that class members wanted resolved, and to insure that any jurisdictional requirements were met, class counsel would be required to present "exemplary class members" as part of the certification process. Such exemplary class members, however, simply would be members of the class, and the fate of the class claim would not automatically rise or fall with the fates of the exemplary class members. In addition, to insure adequate supervision of class counsel, counsel would be required to present at the certification hearing proposed "class monitors." These monitors, who would not necessarily be class members, could be institutions or individuals. The key would be finding people or entities willing to and capable of supervising the class counsel. In sum, the thrust of the proposal is to attack directly the real problems generated by the class action and to get away from phantom issues that exist precisely because Rule 23, by its use of a class representative, lulls us into believing that the class action is simply a traditional lawsuit in a larger package.

I. The Problem: The Role of the Class Representative Today

A. Class Action Doctrine

Class action jurisprudence is confused and inconsistent when it comes to defining the role of the class representative. Superficially, the class representative plays an obvious part: he is the party bringing (or occasionally defending) the lawsuit. He fills the same position

that the plaintiff (or defendant) in the traditional two-party lawsuit fills.[4] Yet, this analysis is just that: superficial. Apart from filling a space on the caption of the complaint, the purpose served by the named plaintiff's presence remains a largely unanswered question.

The most significant—and at the same time, most confusing—area of involvement for the class representative is in evaluating standing and mootness.[5] The confusion here can be traced to two conflicting and fundamentally irreconcilable approaches used by the United States Supreme Court in resolving class action standing and mootness issues.[6]

In one line of cases, the Court treated the named plaintiff as the pivotal character in the class lawsuit.[7] In these cases, the failure of the named plaintiff's individual claim meant the failure of the entire class action. In *Board of School Commissioners v. Jacobs,* for instance, the Court held that when the named plaintiff's individual

4. In the vast majority of class actions, the class and the class representative are the plaintiffs. 1 H. NEWBERG, *supra* note 2, § 3.02, at 133; Comment, *Defendant Class Actions and Federal Civil Rights Litigation,* 33 UCLA L. REV. 283, 284 (1985) (authored by Angelo N. Ancheta). Because this is the typical scenario, it will be assumed for the purposes of this Article that the class is prosecuting rather than defending the law suit.

5. As many commentators have lamented, the law of standing and mootness in general is confusing and inconsistent. *See, e.g.,* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis,* 1984 WIS. L. REV. 37, 39-41; Monaghan, *Constitutional Adjudication: The Who and When,* 82 YALE L.J. 1363, 1379-82 (1973); Nichol, *Rethinking Standing,* 72 CALIF. L. REV. 68, 68-73 (1984); Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645, 660-69 (1973); Tushnet, *The New Law of Standing: A Plea for Abandonment,* 62 CORNELL L. REV. 663, 663-64 (1977). Some scholars attribute this, at least in part, to the manipulative quality of the injury-in-fact test. *See, e.g.,* Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court,* 96 HARV. L. REV. 4, 16-23 (1982) [hereinafter Chayes, *Foreword*]; Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 231-33 (1988); Nichol, *supra,* at 74-82; Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432, 1448-66 (1988).

6. For a detailed description of the Supreme Court decisions relating to class action standing and mootness, see Burns, *Standing and Mootness in Class Actions: A Search for Consistency,* 22 U.C. DAVIS L. REV. 1239, 1242-62 (1989). *See also* Bledsoe, *Mootness and Standing in Class Actions,* 1 FLA. ST. U.L. REV. 430 (1973) (class action is moot only when the entire class's interests are moot, and a class representative who has standing when a class suit is filed will not be deprived of such standing when the representative's claim subsequently becomes moot); Champlin, *Personal Stake and Justiciability: Application to the Moot Class Action,* 27 U. KAN. L. REV. 85 (1978) (questioning whether the personal stake requirement for class representation is a valid means for insuring justiciability values—values that need clarification themselves); Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions,* 54 TEX. L. REV. 1289, 1320 (1976) (authored by James M. Summers) (exploring the principles that determine whether a class action will continue after the named representative's claim becomes moot).

7. Blum v. Yaretsky, 457 U.S. 991 (1982); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974). Hereinafter, I will refer to this approach as the *"Jacobs"* approach.

claim was mooted before class certification, the entire lawsuit had to be dismissed, regardless of whether the issue remained "alive" for the class.[8] Similarly, in other cases, when the named plaintiff failed to allege injury to himself, the entire action fell,[9] even though the district court had certified a class and awarded class-wide relief.[10] Furthermore, the Supreme Court has held that if the named plaintiff's claims failed on the merits before class certification, the class allegations must be dismissed because no "class" could exist apart from the class representative prior to certification.[11]

In each of these class actions, the Supreme Court applied a traditional "personal stake" approach to standing and mootness developed in nonclass lawsuits: in order to bring an action, the plaintiff had to allege a "personal stake" in the outcome of the case.[12] The Court then looked to the class representative to fulfill this standing

8. *Jacobs,* 420 U.S. at 129-30. The Court reached the same result in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 429-31 (1976), and in Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Some commentators argue that *Jacobs, Weinstein,* and *Spangler* can be read more narrowly and point out that in these cases there were no proper class certifications before or after the named plaintiffs' claims became moot. *See* Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions,* 35 STAN. L. REV. 897, 910 (1983); Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives,* 26 BUFFALO L. REV. 83, 106 (1976-77).

9. *O'Shea,* 414 U.S. 488. The Supreme Court used the same rationale to deny standing in Warth v. Seldin, 422 U.S. 490 (1975).

10. *Blum,* 457 U.S. at 997-98; *see also Rodriguez,* 431 U.S. at 399-403 (the class allegations were stricken even though the court of appeals had certified a class and found class-wide liability).

11. *Rodriguez,* 431 U.S. at 403-04. Although the Court analyzed the issue in *Rodriguez* in terms of Rule 23 rather than Article III, the decision was nonetheless essentially a standing or mootness decision. Under the current law, Article III standing and Rule 23 are separate but intertwined concepts. Standing, in the sense of a personal stake and a concrete issue, is a requirement in all actions, class and nonclass. Once the individual has satisfied this threshold standing requirement, the issue in the class action is whether he may assert the rights of the class in addition to his own rights. The question of whether he may assert class rights depends on whether he has satisfied the requirements of Rule 23. *See* 1 H. NEWBERG, *supra* note 2, § 2.05, at 48, § 2.07, at 53-54. In *Rodriguez* the Supreme Court held that the named plaintiffs who failed to prove the merits of their individual employment discrimination claims failed to meet the Rule 23(a) requirement that a representative be a member of the class that he seeks to represent. *Rodriguez,* 431 U.S. at 403. This very issue of continued membership in the class is, however, also the standing and mootness question.

12. The personal stake test for standing in nonclass cases was articulated in Baker v. Carr, 369 U.S. 186, 204 (1962), and Flast v. Cohen, 392 U.S. 83, 99-106 (1968). In these cases the Court viewed the plaintiff's personal stake as causally linked to the goal of standing: "concrete adverseness."

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy *as to assure* that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Flast, 392 U.S. at 99 (emphasis added) (quoting *Baker,* 369 U.S. at 204).

requirement. If the class representative failed to satisfy the personal stake requirement, there was no Article III case or controversy and the entire case had to be dismissed,[13] even in the face of an obvious "class" of persons for whom the issue continued to be very much alive.

In a second line of cases, however, the Supreme Court largely ignored the class representative and focused on the *class* element of the class action to resolve standing and mootness questions.[14] The Court recognized that declaring the named plaintiff's individual claim moot in no way diminished the real and live issue between the class and the defendant. In *Sosna v. Iowa,* for instance, the Court held that once there was certification, the class could supply the personal stake necessary for Article III standing.[15] Later, in *Gerstein v. Pugh* and *United States Parole Commission v. Geraghty,* the Court carried this doctrine further by permitting the class actions to continue even though the representatives' claims dropped out before class certification.[16]

13. As Justice White stated in *O'Shea:* "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." 414 U.S. at 494. The Court echoed this in *Blum,* stating that the named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." 457 U.S. at 1001 n.13 (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)). *See also Jacobs,* 420 U.S. at 129 (class action by members of high school newspaper dismissed as named representatives had since graduated); *Weinstein,* 423 U.S. at 148 (action against parole board alleging class entitled to procedural rights in parole hearings declared moot when respondent paroled); *Spangler,* 427 U.S. at 430 (case moot for respondent high school students since they had since graduated). In *Jacobs, Weinstein* and *Spangler,* the court did *not* use the "personal stake" language or discuss dismissal specifically in terms of Article III. In each, the court evidently thought that mootness obviously resulted in dismissal and that further comment was unnecessary.

14. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Gerstein v. Pugh, 420 U.S. 103 (1975); Sosna v. Iowa, 419 U.S. 393 (1975). Hereinafter, I will refer to this approach as the "*Sosna-Geraghty*" approach.

15. *Sosna,* 419 U.S. at 397-403. The following term, in Franks v. Bowman Transp. Co., 424 U.S. 747, 752-57 (1976), the Court made it clear that the holding of *Sosna* was not limited to intrinsically transitory claims. According to the *Sosna* Court, when the district court certified the class, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the named plaintiff]." *Sosna,* 419 U.S. at 399. Thereafter the case or controversy requirement of a "personal stake" was satisfied by the certified class's continuing controversy with the defendant. "The controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402.

16. The Court justified this result in *Gerstein* on the ground that the class claim was transitory and in the "capable of repetition, yet evading review" category. *Gerstein,* 420 U.S. at 110 n.11. The Court noted that "the constant existence of a class of persons suffering the deprivation is certain" and that the Court could "safely assume" that the lawyer representing the class (a public defender) "has other clients with a continuing live interest in the case."

In contrast to the Court's traditional approach used in *Jacobs*, with its emphasis on the class representative, the Court employed a function and class-oriented approach to standing and mootness problems in this second line of cases.[17] Acknowledging that the class action is a "nontraditional form[] of litigation,"[18] the Court looked to whether the purported function of standing—"concrete adverseness"—was present.[19] Finding a "sharply presented issue[] in a concrete factual setting and self-interested parties vigorously advocating opposing positions," the *Geraghty* Court concluded that the standing requirement of Article III was satisfied.[20] Thus, while continuing to pay lip service to the "personal stake" requirement, the Court shifted its focus to the *class* and absent class members, even before certification, to provide the necessary personal stake or concrete adverseness.[21]

Id. at 111 n.11.

The Supreme Court previously had used the "capable of repetition, yet evading review" exception in nonclass cases. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 123-25 (1973). The rationale for this exception in nonclass actions is that the litigant, facing some likelihood of becoming involved in the same controversy in the future, can be expected to prosecute the case with rigorous advocacy. Champlin, *supra* note 6, at 88-89. Thus, in the nonclass action, it is routinely required that the plaintiff himself will likely face the same injury in the future. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 105-10 (1983). *See generally* Donaldson, *A Search for Principles of Mootness in the Federal Courts: Part One—The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1291-1308 (1976). In applying the exception to class actions, however, the *Gerstein* Court emphasized the absent class members rather than the named plaintiff. While the plaintiff in the nonclass case must show that he will likely face the same injury in the future, the *Gerstein* Court suggested that there is no such requirement in a class action. The exception would apply if the absent class members would likely suffer repeated injuries, even when there was no indication that the named plaintiff would suffer any repetition of the injury. *Gerstein*, 420 U.S. at 110 n.11. The Supreme Court used the *Gerstein* exception in two other cases involving transitory class claims. *See* Schall v. Martin, 467 U.S. 253, 256 n.3 (1984); Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978).

In *Geraghty*, the Court rested its decision on the theory that the named plaintiff retained a live interest in the class certification question even though his claim on the merits was moot. *Geraghty*, 445 U.S. at 401-04. "The question whether class certification is appropriate remains as a concrete, sharply presented issue[,]" and since Geraghty "continues vigorously to advocate his right to have a class certified[, he] retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 403-04.

17. As Professor Chayes noted, the Court in *Sosna* "came close to recognizing the class itself as the litigating entity." Chayes, *Foreword*, *supra* note 5, at 40.

18. *Geraghty*, 445 U.S. at 402.

19. In Flast v. Cohen, 392 U.S. 83 (1968), the Court stated that the goal of standing was to insure "concrete adverseness" between the parties, which in turn would "sharpen[] the presentation" of the issue. *Id.* at 99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). But while *O'Shea*, *Jacobs*, and *Rodriguez* relied upon the named plaintiff's personal stake to guarantee this "concrete adverseness," *Geraghty* stated that "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" *Geraghty*, 445 U.S. at 404.

20. *Geraghty*, 445 U.S. at 403.

21. Although *Geraghty* spoke of the named plaintiff retaining a personal stake in the

Under this functional approach, the role of the class representative essentially was reduced to figurehead status. Here, in contrast to the procedure used in traditional cases, the Court permitted the named plaintiff to continue to "represent" the class, even though the plaintiff no longer had anything personally to gain or lose in the litigation. The Court justified this result by finding continued adequate representation in the representative's vigorous advocacy of class interests.[22] As Justice White noted in his *Sosna* dissent, however, any such vigorous advocacy was clearly more attributable to the class attorney than to the class representative:

> [The named plaintiff] retains no real interest whatsoever in this controversy, certainly not an interest that would have entitled her to be a plaintiff in the first place, either alone or as representing a class. In reality, there is no longer a named plaintiff in the case, no member of the class before the Court. The unresolved issue, the attorney, and a class of unnamed litigants remain. . . . The Court in reality holds that an attorney's competence in presenting his case, evaluated *post hoc* through a review of his performance as revealed by the record, fulfills the "case or controversy" mandate.[23]

In dealing with class action standing and mootness problems, the Supreme Court has vacillated between the traditional approach and the functional approach. Significantly, the Court never has abandoned either;[24] moreover, it has made no attempt to reconcile these fundamentally inconsistent lines of cases.[25] Instead, the jurisprudence of class action standing and mootness has been left as a thicket of jumbled, disconnected rules.[26]

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class certification issue, *id.* at 401-04, the result can be seen as permitting the uncertified class to supply the personal stake, just as *Sosna* had allowed a certified class to do. *See* Greenstein, *supra* note 8, at 915. Moreover, *Gerstein* specifically relied on the existence of absent class members with live claims to justify its result. Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975).

22. *Geraghty,* 445 U.S. at 404; Sosna v. Iowa, 419 U.S. 393, 403 (1975).

23. *Sosna,* 419 U.S. at 412-13 (White, J., dissenting).

24. The two lines of cases enjoy a peaceful coexistence. The Supreme Court often does not even cite troublesome decisions from the opposing line of cases, or if it does, disposes of them summarily. In *Geraghty,* 445 U.S. at 400 n.7, for example, the majority found standing to exist and relegated *Board of School Commissioners v. Jacobs* and its progeny to a footnote, even though each of these cases had dealt specifically with precertification mootness issues. The Court characterized these cases as "adopting a less flexible approach," and the Court completely ignored *East Texas Motor Freight System, Inc. v. Rodriguez. Id.* On the other hand, in *Blum* the Court held, in a post-trial situation, that standing was not established and that part of the class claims had to be dismissed; the Court based its decision on *O'Shea,* without explaining how the result in *Blum* (dismissal of claims for which a class had been certified and for which relief had been granted) could be reconciled with the rationale of *Geraghty* and its emphasis on the function of standing. Blum v. Yaretsky, 457 U.S. 991, 1000-02 (1982).

25. A few commentators have attempted to reconcile the cases but largely agree that any such reconciliation is simply formalistic. *See, e.g.,* Burns, *supra* note 6, at 1276-77; Chayes, *Foreword, supra* note 5, at 44-45.

26. The rules can be summarized as follows:

Outside the standing and mootness area, the Supreme Court has been equally ambivalent about the role of the class representative in fulfilling procedural requirements. Here too, the Court has tended to resolve issues on a case-by-case basis, without providing any overarching doctrinal theory.[27] Consistent with the "traditional" approach, the Court at times has focused on the named representative and required that he satisfy various procedural requirements, such as diversity of citizenship, personal jurisdiction, or exhaustion of administrative remedies.[28] At other times, however, the Court has

(1) Before certification, if the named plaintiff's individual claim becomes moot, the entire action must be dismissed, even in the face of an obvious "certified" class for whom relief has been granted (*O'Shea, Jacobs, Rodriguez,* and *Blum*). *See supra* notes 7-13 and accompanying text.

(2) However, rule (1) does not apply if the claim is transitory and capable of repetition within the class. In this latter situation, a named plaintiff whose claim is declared moot before certification can continue to represent the class on the class certification issue and on the merits (*Gerstein*). *See supra* note 16 and accompanying text.

(3) Rule (1) also does not apply if the named plaintiff, before his claim is declared moot, moves for class certification. If the named plaintiff is successful in getting the class certified, he can continue to represent the class on the merits despite lacking an individual claim of his own (*Sosna*). *See supra* note 15 and accompanying text. If the named plaintiff is unsuccessful in getting the class certified, he can at least continue to represent the class in appealing the class certification question; and if eventually successful, he possibly can represent the class on the merits (*Geraghty*).

The inconsistency between the precertification mootness rule (rule (1)) and the postcertification mootness rule (rule (3)) has been explored. *See* Burns, *supra* note 6, at 1263-80; Greenstein, *supra* note 8, at 909-15; Willborn, *supra* note 1, at 14-24. With regard to rules (2) and (3), Professor Greenstein concludes: "In terms of the case-or-controversy analysis of *Sosna* and *Franks,* . . . the *Gerstein* result is incomprehensible." Greenstein, *supra* note 8, at 905.

27. Chayes, *Foreword, supra* note 5, at 28-36; Hutchinson, *Class Actions: Joinder or Representational Device?,* 1983 SUP. CT. REV. 459, 482-97.

28. *See, e.g.,* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (personal jurisdiction); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (only representative parties need file with the Equal Employment Opportunity Commission in a Title VII class action); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (diversity of citizenship) (overruled on other grounds). Whether the courts look to the representative to exhaust administrative remedies or require that each absent class member also exhaust these remedies varies with the underlying statute. In Califano v. Yamasaki, 442 U.S. 682, 701 (1979), the Supreme Court suggested that all class members must make filings under the Social Security Act. Similarly, courts have held that under the Federal Tort Claims Act, each absent class member must meet the administrative filing requirements. Lunsford v. United States, 570 F.2d 221, 227 (8th Cir. 1977); Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 23 (3d Cir. 1975). These latter cases, in which the focus is on the entire class and the named plaintiff is given no special role, are consistent with the "functional" approach of the standing and mootness cases.

It is also interesting to note that, although *Shutts* looked to the named plaintiff's personal jurisdiction, the Court repeatedly and uniformly referred to the absent class members as "plaintiffs." *Shutts,* 472 U.S. 797 *passim.* For discussions of *Shutts,* see Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action,* 34 U. KAN. L. REV. 255 (1985); Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96

used the "functional" approach and focused on the absent class members, treating them even before certification as "parties" to the lawsuit. The Court has held, for instance, that each class member must satisfy the amount-in-controversy requirement.[29] The Court also has held that the statute of limitations is tolled for the absent class members from the time the complaint is filed until the district court denies class certification.[30] And in another decision, the Court allowed an absent "class member" of an uncertified class to intervene, years after the denial of class certification, in order to appeal the certification question.[31] The common theme running through these latter decisions is the assumption that the absent class members are "parties" to the lawsuit on an equal standing with the class representative before certification is granted, and to some extent, even after certification is denied.[32]

Given the Supreme Court's failure to develop a single, philosophically consistent approach to the respective roles of the class representative and absent class members, the lower courts have created a confusing hodgepodge of class action case law. Although the courts have been applying the present Rule 23 for more than twenty years, no coherent jurisprudence of class actions has emerged. Rather, as evidenced by the courts' handling of three key class action questions—(1) precertification mootness of the named plaintiff, (2) posttrial inadequacy of the named plaintiff, and (3) precertification settlement by the named plaintiff—the class action doctrine developed by the lower courts simply reflects and magnifies the confusion found in the Supreme Court decisions.[33]

YALE L.J. 1 (1986); Wood, *Adjudicatory Jurisdiction and Class Actions,* 62 IND. L.J. 597 (1987).

29. Zahn v. International Paper Co., 414 U.S 291, 301 (1973).

30. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). The absent class members were "parties to the suit until and unless they received notice thereof and chose not to continue." *Id.* at 551. For a detailed discussion of *American Pipe,* see Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771 (1975).

31. United Airlines, Inc. v. McDonald, 432 U.S. 385, 391-96 (1977). The dissenting justices in *McDonald* appropriately noted that "[p]ervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status." *Id.* at 399 (Powell, J., dissenting).

32. Most recently, in Hoffmann-La Roche, Inc. v. Sperling, 110 S. Ct. 482 (1989), the Supreme Court treated absent class members in an opt-in class as "parties" before class certification. The Court held that a district court, pursuant to its "managerial responsibility" over class actions, could facilitate notice to potential members of an opt-in class. *Id.* at 486. As the dissenting justices noted, however, because this was an opt-in class, the people to whom the notice was sent were not yet "parties" to the action and had no cases to be managed. *Id.* at 489 (Scalia, J., dissenting).

33. For a detailed analysis of the lower court cases in these three areas, see Burns, *supra* note 6, at 1263-85.

In the area of precertification mootness (in which the named plaintiff's claim is declared moot before class certification), most lower courts follow the traditional *Jacobs* approach and hold that the entire class action must be dismissed despite injury to absent "class members" and the likelihood of duplicative litigation.[34] Yet a few courts recognize that even in the precertification mootness situation, there may be a live and sharply-contested issue between the class and the defendant, and under the *Sosna-Geraghty* functional approach, standing could be satisfied by focusing on the interest of the absent class members.[35]

When faced with *post*-trial mootness or inadequacy of the named plaintiff,[36] a number of courts wholly abandon the traditional approach and follow the *Sosna-Geraghty* class-oriented approach. In contrast with the traditional approach typically used in precertification cases, these courts find that because the function of standing is satisfied through the presence of a sharply-presented, factually-concrete, and vigorously-litigated issue, the "class" findings on the

34. *See, e.g.,* Rocky v. King, 900 F.2d 864, 869 (5th Cir. 1990); Tucker v. Phyfer, 819 F.2d 1030, 1035 (11th Cir. 1987); Davis v. Ball Memorial Hosp. Ass'n, 753 F.2d 1410, 1417-19 (7th Cir. 1985); Kennerly v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983); Inmates of Lincoln Intake & Detention Facility v. Boosalis, 705 F.2d 1021, 1023-24 (8th Cir. 1983); Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1289 (8th Cir. 1982); Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980); Cicchetti v. Lucey, 514 F.2d 362, 366-67 (1st Cir. 1975); Cokley v. Hayden, 731 F. Supp. 1013, 1015 (D. Kan. 1990). Ironically (and perhaps as evidence of their confusion), a number of these courts rely on *Geraghty* in reaching their decision. *See, e.g., Tucker,* 819 F.2d at 1033; *Kennerly,* 721 F.2d at 1260.

35. *See, e.g.,* Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1048 (5th Cir. 1981); Lewis v. Tully, 99 F.R.D. 632, 638-44 (N.D. Ill. 1983).

36. This situation arises when the district court, believing the named plaintiff to be a proper representative, certifies the class and tries the case, but later determines that, as a matter of law, the named plaintiff could not represent the class on part or all of its claims. In the past, the situation often arose when an employee brought an employment discrimination class action under an "across-the-board" theory. The theory was that the plaintiff employee who suffered one type of employment discrimination could represent a class asserting other, different types of employment discrimination. For instance, the employee discriminated against in a promotion decision may represent a class of applicants denied employment as well as a class of employees who, like himself, were denied promotions. *See, e.g.,* Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975). In General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982), the Supreme Court held that such across-the-board actions violated Rule 23 to the extent the class representative was not a member of the class he sought to represent. Prior to the decision in *Falcon,* a number of district courts had permitted named plaintiffs to represent broad employment classes under across-the-board theories. In light of *Falcon,* however, the courts of appeals later held the across-the-board approach to be inapplicable as a matter of law, and consequently, there were no class representatives for part of the class claims. *See, e.g.,* Goodman v. Lukens Steel Co., 777 F.2d 113, 121-26 (3d Cir. 1985), *aff'd on other grounds,* 482 U.S. 656 (1987), *cert. dismissed,* 487 U.S. 1211 (1988); Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir. 1982), *cert. denied,* 459 U.S. 981 (1982).

merits can stand even though the class representative is found later to have been legally inadequate.[37] These courts reason that to do otherwise would needlessly hurt the successful class and result in duplicative litigation.[38] The inadequacy of the named plaintiff is only a "technical" failure that should not be determinative of the outcome of the case.[39] As the Third Circuit stated, "it is counsel for the class who has the laboring oar" in "shap[ing] the claims for adjudication," and the class representatives simply "furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy."[40]

While such a functional, class-oriented approach to the post-trial inadequacy problem is fully consistent with the philosophy of *Sosna, Gerstein,* and *Geraghty,* it directly contradicts the traditional *Jacobs* approach. According to the latter approach, when the class representative lacks a personal stake, the district court has no jurisdiction and there can be no "class" or "class findings," regardless of how successful the "class" was.[41]

A third issue, precertification settlement by the named plaintiff, further confounds class action jurisprudence. Here, the primary question is whether Rule 23(e),[42] which requires court approval for

37. *See, e.g., Goodman,* 777 F.2d at 124; *Hill,* 672 F.2d at 388-92; Thurston v. Dekle, 531 F.2d 1264, 1270 (5th Cir. 1976), *vacated on other grounds,* 438 U.S. 901 (1978). *See also* Mayberry v. Maroney, 558 F.2d 1159, 1161-62 (3d Cir. 1977) (the class lawyer continued to litigate for the class after the named plaintiff effectively withdrew from the case). In *Thurston,* the Fifth Circuit held that the purpose of standing was satisfied because both parties and the district court had believed that the named plaintiff had standing. *Thurston,* 531 F.2d at 1270. Although the court openly acknowledged that "[u]se of the conventional form of standing analysis leads to the conclusion that this case should be reversed because no named plaintiff had standing," it concluded that doing so would "exalt[] form over substance." *Id.*

38. *See, e.g., Goodman,* 777 F.2d at 124; *Hill,* 672 F.2d at 386; *Thurston,* 531 F.2d at 1270-71.

39. The Fourth Circuit observed in *Hill* that the finding of inadequacy of the class representative had been based merely on a "technical lack of identity of interest and injury between representative and class," as opposed to an "actual" ineffectiveness of representation. *Hill,* 672 F.2d at 389. The court concluded that the named plaintiff's "actual effectiveness" was seen in the favorable result on the class claims. *Id.* at 391.

40. *Goodman,* 777 F.2d at 124. Given the small role actually played by the named plaintiff in the class action, the court concluded that there was a "distinct possibility that the evidence presented would not have varied one iota had a qualified representative for each claim been present from the inception of the suit." *Id.*

41. In keeping with the traditional approach, some courts have held that in the post-trial inadequacy situation, the entire action must be dismissed, even though there has been a trial in which the "class" has won on the merits of its claims. *See, e.g.,* Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1409-11 (D.C. Cir. 1988), *cert. denied,* 109 S. Ct. 3155 (1989); Griffin v. Dugger, 823 F.2d 1476, 1482-84 (11th Cir. 1987), *cert. denied,* 486 U.S. 1005 (1988); Brady v. Thurston Motor Lines, 726 F.2d 136, 146 (4th Cir.), *cert. denied,* 469 U.S. 827 (1984).

42. FED. R. CIV. P. 23(e) states: "A class action shall not be dismissed or compromised

the dismissal or compromise of a "class action," applies when no class has been certified and the named plaintiff is settling only his individual claim.[43] In dealing with this issue, lower courts have overwhelmingly held that even before certification, a "class" exists for purposes of Rule 23(e) and therefore any settlement, even of individual claims, requires court approval.[44] In justifying this result, courts typically speak of the need to protect the absent "class members" who may be prejudiced by the named plaintiff's settlement of his individual claims.[45]

Such an assumed existence of the class and concern for prejudice to the absent "members" of the uncertified class is in sharp contrast to and fundamentally irreconcilable with the precertification mootness cases, in which most courts dismiss the entire action, regardless of the obviousness of the "class" or the magnitude of the detriment to absent class members.[46] Yet, the same court that follows a strict traditional

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without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

43. Rule 23(e) clearly applies to cases in which the class has been certified or in which class claims are being settled (before or after certification). 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 2, § 1797 (collecting cases).

44. *See, e.g.*, Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1406-08 (9th Cir. 1989); Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 627 (7th Cir. 1986); Simer v. Rios, 661 F.2d 655, 664-66 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); Lawrence v. Pickens (*In re* Phillips Petroleum Sec. Litig.), 109 F.R.D. 602, 607 (D. Del. 1986); Larkin Gen. Hosp. v. American Tel. & Tel. Co., 93 F.R.D. 497, 500 (E.D. Pa. 1982); Wallican v. Waterloo Community School Dist., 80 F.R.D. 492, 493 (N.D. Iowa 1978). *Contra* Shelton v. Pargo, Inc., 582 F.2d 1298, 1303-06, 1314-16 (4th Cir. 1978) (holding that Rule 23(e) does not apply but that the district court should nonetheless review the precertification settlement of the representative's individual claims). For commentaries on this issue, *see* Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?*, 56 N.C.L. REV. 303 (1978); Schuster, *Precertification Settlement of Class Actions: Will California Follow the Federal Lead?*, 40 HASTINGS L.J. 863 (1989).

A different settlement issue that arises with some frequency in class actions is: May a defendant contact absent "class members" and settle with them before class certification, or are they "parties" who only may be contacted through the class attorney? Interestingly, in answering this question, some courts hold the absent "class members" are not parties and may be contacted. *See* Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787, 820-23 (1982-83) (collecting cases).

45. *Diaz*, 876 F.2d at 1406-08; *Glidden*, 808 F.2d at 627; *Simer*, 661 F.2d at 664-66; *Lawrence*, 109 F.R.D. at 607; *Larkin Gen. Hosp.*, 93 F.R.D. at 500; *Wallican*, 80 F.R.D. at 493; Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 314-19 (1985) (authored by Sylvia R. Lazos).

46. *See, e.g.*, Tucker v. Phyfer, 819 F.2d 1030, 1035 (11th Cir. 1987); Davis v. Ball Memorial Hosp. Ass'n, 753 F.2d 1410, 1417-19 (7th Cir. 1985); Kennerly v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983); Inmates of Lincoln Intake & Detention Facility v. Boosalis, 705 F.2d 1021, 1023-24 (8th Cir. 1983); Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1289 (8th Cir. 1982); Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980);

approach when the named plaintiff's individual claims become moot before certification generally is willing to "assume" the existence of a class and protect that class if the named plaintiff settles before certification.[47]

In short, despite twenty years of using Rule 23, neither the Supreme Court nor the lower courts have developed a consistent or coherent class action jurisprudence. Sometimes, the Supreme Court has followed a traditional approach, emphasizing the status of the named plaintiff, and at other times it has used a functional, class-oriented approach practically dispensing with the named plaintiff. Given the fundamental inconsistency of these two approaches, the lower courts also have failed to develop a unified class action doctrine. Instead, lower courts typically have compartmentalized the various class action issues and treated each issue as distinct and unrelated to other class action issues.[48] The result is a crazy quilt of case law with no consistency or cross reference from one issue to another.

Cicchetti v. Lucey, 514 F.2d 362, 366-67 (1st Cir. 1975); K v. Complaints Comm., 618 F. Supp. 307, 312-13 (S.D. Miss. 1985).

47. A court may use the traditional, class-representative approach to precertification mootness and yet use a functional, class-oriented approach to post-trial inadequacy or precertification settlement problems. *Compare Davis*, 753 F.2d 1410 (decertification affirmed and class action dismissed when the named representatives settled their claims with a hospital and no longer could show a personal stake in the existing controversy) *with Glidden*, 808 F.2d 621 (appeal dismissed when the granting of a summary judgment to the defendant prior to a class certification did not equate to a final judgment for appellate jurisdictional purposes). In the post-trial inadequacy situation, some circuits appear to be on both sides of the issue. *Compare* Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976) (based on the peculiar facts, the court found the required standing in the class representative when an adversative context existed throughout the entire proceedings, although standing subsequently was mooted by a jurisdictional change in the law), *vacated on other grounds,* 438 U.S. 901 (1978) *with* Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1200-01 (5th Cir.) (certification vacated and case remanded because the class representatives' asserted claims were not typical of their personal claims), *cert. denied,* 469 U.S. 1073 (1984).

There is superficial logic in this approach. The likelihood of prejudice to the "class" is much greater when the named plaintiff settles his own claims than when the named plaintiff's claims are declared moot before certification. The risk is greater because of the appearance that he and class counsel are "selling out" the class claims in return for a larger personal settlement. A court, concerned about prejudice to the "absent class," therefore might be more cautious in the settlement situation than in the mootness situation. Similarly, there is a substantially greater chance of harm to the class in a post-trial inadequacy situation (when the class has "won") than in a precertification mootness case when little effort has been expended. Here again, this may account for a court being more protective of the class in one situation (post-trial inadequacy) than in another (precertification mootness). Any attempted rationalization of these cases, however, is flawed because it fails to take into account the teachings of *O'Shea* and *Blum:* Absent class certification, there is no "class" to be protected no matter how great the prejudice or how substantial the savings in terms of judicial economy. And in light of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), until there is a valid class certification, the class complaint tolls the statute of limitations for all absent class members. *Id.* at 552-53.

48. Two other class action issues that have engendered considerable confusion among the

B. Class Action Practice

Class action practice is not as confusing as class action doctrine. In practice, the role of the class representative evokes little controversy. Instead, there is a general recognition that the named plaintiff is largely a figurehead who plays little or no part in the initiation and prosecution of the class claim.[49]

This recognition is part of a larger awareness that the class action simply does not function like the traditional private-rights lawsuit around which most common law jurisprudence and practice has developed.[50] The class action may have some similarity with the traditional lawsuit, in that the class representative occupies the position of a traditional plaintiff or defendant, but that similarity is merely superficial.[51] As the Supreme Court stated in *Geraghty,* at heart the class action is truly a "*non*traditional" form of litigation.[52]

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lower courts are (1) counterclaims against class members, and (2) future class actions. For a discussion of the status of absent class members for purposes of counterclaims, see Steinman, *The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims,* 69 GEO. L.J. 1171 (1981). Professor Steinman notes that some courts hold that absent class members are not "parties" for purposes of counterclaims unless and until they file damage claims, while other courts take the position that absent class members who fail to opt out are "parties" subject to counterclaims. *Id.* at 1175-79. For a discussion of the Article III issues posed by future class actions and the various ways in which the lower courts have handled these issues, see Schuwerk, *Future Class Actions,* 39 BAYLOR L. REV. 63 (1987).

49. *See* Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), *aff'd on other grounds,* 482 U.S. 656 (1987):

> We begin by acknowledging the realities of class suits, a sometimes neglected approach in this field. In a massive class action such as the one at hand, it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims for adjudication by the compilation of factual and expert testimony and the presentation of statistical and documentary evidence.

Id. at 124. *See also* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced judge knows that any statements to the contrary is [sic] sheer sophistry.").

50. Professor Rosenberg argues that common law doctrine not only evolved around the traditional two-party lawsuit, but that the common law holds out the traditional lawsuit as the ideal form of litigation. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means,* 62 IND. L.J. 561 (1987).

51. Professor Chayes identifies five characteristics of the traditional model of litigation: (1) it is "bipolar," *i.e.,* "between two individuals" or "two unitary interests"; (2) it is "retrospective"; (3) the "right and remedy are interdependent" in that "[t]he scope of relief is derived more or less logically from the substantive violation"; (4) it is a "self-contained episode" since "the judgment is confined to the parties"; and (5) "[t]he process is party-initiated and party-controlled" with the judge acting as a "neutral arbiter." Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1282-83 (1976) [hereinafter Chayes, *The Role of the Judge*]. *See also* Kennedy, *Class Actions: The Right to Opt Out,* 25 ARIZ. L. REV. 3, 25-29 (1983) (discussing the individual's duty of initiative, the right not to be solicited, and the right not to be represented).

52. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980).

First and foremost, unlike the traditional model of litigation, which involves a dispute between two private individuals with unitary interests,[53] the class action is fundamentally a device to resolve the problems of a group of individuals.[54] The class action is not an application of rights, duties, and remedies to an individual case brought by a particular person seeking his day in court.[55] Rather, as Professor Chayes points out, the class action "is a reflection of our growing awareness that a host of important public and private interactions . . . are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals."[56] A single action or practice of a corporation or governmental agency may affect hundreds or thousands of people.[57] The class action permits the affected group to challenge the activity and to aggregate (and to some extent average) their individual circumstances and interests in seeking relief.[58] In doing so, moreover, the class action frequently seeks to vindicate a political or social "right" (what some term a "public right") rather than simply the "private right" envisioned by the traditional litigation model.[59]

53. Under the traditional private-rights view, the purpose of the lawsuit is to determine the rights of individuals and to protect concrete personal rights; Chayes, *The Role of the Judge, supra* note 51, at 1282-83; Monaghan, *supra* note 5, at 1365-68.

54. For a thorough history of group litigation, see Yeazell, *From Group Litigation to Class Action* 27 UCLA L. REV. 514, 1067 (1980) (pts. 1 & 2). Professor Yeazell argues that the class action historically has been used as a stopgap, a temporary solution by groups on the fringe of social recognition and political power who cease to need the class action once they gain sufficient power to win legislation protecting their interests. *Id.* at 563. *See also* Chayes, *Foreword, supra* note 5, at 26-28 (class actions emphasize the concept of groups as "right bearers" by being a form of political expression and a means of redressing political and social concerns); Monaghan, *supra* note 5, at 1382 (in constitutional cases, class actions "serve as 'public actions' vindicating broad public interests not protected under the traditional private rights model").

55. Monaghan, *supra* note 5, at 1382-83; Rosenberg, *supra* note 50, at 561-62.

56. Chayes, *The Role of the Judge, supra* note 51, at 1291.

57. "Because of our mass economy, dominated by big businesses, monolithic governmental structures, and burgeoning bureaucracy, it is not unusual for the decision or practice of one government or corporate official to affect thousands or even millions of citizens." Kane, *supra* note 8, at 91.

58. Rosenberg, *supra* note 50, at 562. *See also,* Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. CHI. L. REV. 877, 906-07 (1987) [hereinafter Coffee, *The Regulation of Entrepreneurial Litigation*] (discussing the problem of "adverse selection" in class actions; namely, that persons with weaker claims are likely to want the class action in order to hide the weaknesses of their individual cases, while the claimants with strong cases may opt out of the class action so as not to be dragged down by weaker claimants).

59. Chayes, *Foreword, supra* note 5, at 27-28; Monaghan, *supra* note 5, at 1382; Yeazell, *supra* note 54, at 1114-15. The term "public right" or "public action" refers to a right or action brought by a private person primarily to vindicate the public interest in the enforcement

A second major difference between the class action and the traditional litigation model lies in the role of the client. In traditional litigation, the lawsuit is party-initiated and party-controlled: the disgruntled client hires a lawyer to pursue the client's claim, and the client monitors the lawyer's activities in prosecuting the lawsuit.[60] The class action, in contrast, typically is not initiated or controlled by the class representative. In most class actions, the class attorney first finds the class claim and *then* seeks out a client to be the class representative.[61] The class attorney may use a "professional" class representative; he may find the "client" through an informal "underground railroad" network of referrals among class action attorneys; he may engage in nationwide advertising to solicit a class representative.[62] In addition, the class attorney may switch from one class representative to another as the case progresses and different characteristics in the class representative are needed.[63] Regardless of how the class representative is chosen, the class attorney typically makes the decision to initiate the suit, even in those cases in which the representative brings the claim to the lawyer's attention. Furthermore, unlike the client in a traditional lawsuit, the class representative has little or no control over the

of public obligations. Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 n.11 (1969). *See also* Chayes, *Foreword*, *supra* note 5, at 4-5; Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1978).

Although the same injunctive relief obtainable in a class action is technically available through an individual action, some commentators argue that the class action is nonetheless a better vehicle for litigating group-held public and private rights. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492, 499-502 (1982); Kamp, *Adjudicating the Rights of the Plaintiff Class: Current Procedural Problems*, 26 ST. LOUIS U.L.J. 364, 375-76 (1982); Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 J.L. REFORM 347, 355-63 (1988).

60. *See* Chayes, *The Role of the Judge*, *supra* note 51, at 1283; Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 58 (1975); Kennedy, *supra* note 28, at 284.

61. A recent empirical study of class actions showed that the typical class lawsuit is not initiated by an express client complaint or any overt dispute. Instead, the class action attorney generally searches out a class claim (often by "piggybacking" on a government action) and then finds a suitable class representative to be the nominal plaintiff. Garth, Nagel & Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 375-77, 386-87 (1988).

62. Coffee, *Rethinking the Class Action*, *supra* note 3, at 632; Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681-83 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 58, at 885-86, 900; Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 325 (1986).

63. In their empirical study of class actions, Garth, Nagel, and Plager found that the success of a class action lawyer largely depended on his abilities to search out the best class representative and to shift from one named plaintiff to another as the case required. Garth, Nagel & Plager, *supra* note 61, at 378-80.

conduct of litigation once the class action has begun. Rather, as the Third Circuit observed, the class lawyer carries the "laboring oar" in shaping and presenting the case, and the class representative typically provides no more than anecdotal testimony in deposition or trial.[64]

This reversal of the traditional attorney-client roles in class actions[65] stems from a number of factors. In part, the economics of the class litigation dictate the change. Unlike the traditional lawsuit, in which the client usually has a larger financial stake than his attorney,[66] the class attorney has a larger stake in the form of attorney fees than the individual class member, who typically is going to recover a modest sum, at best.[67] As Professor Coffee has noted, given these class action economics, the class attorney inevitably acts as an entrepreneur, whose decision to bring the class suit is essentially a capital budgeting decision.[68] Furthermore, once the class action has begun, the class rep-

64. Goodman v. Lukens Steel Co., 777 F.2d 113, 124 (3d Cir. 1985), *aff'd on other grounds,* 482 U.S. 656 (1987), *cert. dismissed,* 487 U.S. 1211 (1988). *See also* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is [sic] sheer sophistry."); Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 COLUM. L. REV. 299, 308 (1980) ("In most small-claim class damage actions . . . plaintiff's counsel . . . is in reality the class representative."); Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 877 (The notion that the client controls the class action is a "noble myth."); Kane, *supra* note 8, at 113 ("[T]he attorney is truly the class representative.").

65. Whereas the traditional client-attorney arrangement is one of principal-agent with the lawyer acting as agent, the lawyer in the class action assumes the role of principal or independent entrepreneur. Coffee, *Rethinking the Class Action, supra* note 3, at 628-29; Coffee, *Understanding the Plaintiff's Attorney, supra* note 62, at 677-85.

66. The attorney may be working on a contingent fee arrangement, but still will receive only a fraction of the client's recovery. Dam, *supra* note 60, at 58.

67. Berry, *supra* note 64, at 308; Coffee, *Understanding the Plaintiff's Attorney, supra* note 62, at 677-78 (Professor Coffee notes that empirical studies confirm the common sense conclusion that typically the representative party has a very small stake in the outcome of the class action. *Id.* at 678 n.22.); Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 884. In many civil rights actions, the class members will have no economic interest in the lawsuit, and accordingly, may be less likely to take an active role in supervising the attorney. Bergman, *Class Action Lawyers: Fools for Clients?,* 4 AM. J. TRIAL ADVOC. 243, 245-46 (1980). Typically, the class attorney also bears the financial risk of loss. The class attorney usually does not seek to recover costs from the class representative when the class action is unsuccessful. Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 897-98; Underwood, *supra* note 44, at 804-09.

68. Professor Coffee contends that the class attorney will assess the question in terms of the lawyer's opportunity costs, his expected return, and his level of risk aversion. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* 48 LAW & CONTEMP. PROBS., Summer 1985, at 5, 12. *See also* Coffee, *Rethinking the Class Action, supra* note 3, at 627-29 (class actions may evoke an enhanced "agency cost problem" between the principal and the agent; for example, the cost of agent monitoring and advertising, "bonding cost," and "unavoidable residual cost"); Dam, *supra* note 60, at 60 (arguing that attorneys in most

resentative, having a relatively small financial stake in the lawsuit, is unlikely to invest much time or effort in monitoring the litigation.[69] Instead, the attorney, who has the greater financial interest, will make the litigation decisions unfettered by an intruding client.[70] The class attorney may even seek out a compliant class representative to avoid client intrusion.[71] And even if a class representative wishes to take an active role in the case, he may not be able to do so. Many important decisions in a class action involve complex, procedural matters—decisions that have low visibility but demand a high level of sophistication and expertise to understand and monitor.[72]

The class action also differs from traditional private-rights litigation in that there is not always a unity of interest on the class side of the case. Rather, because the judge frequently can choose between a range of remedies in a class action (unlike the traditional lawsuit in which the remedy typically is derived from the substantive violation),[73] class members may hold differing views on litigation objectives and particularly on remedies or terms of settlement.[74] For instance,

class actions have a larger monetary stake in a lawsuit than the class members); Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer,* 66 TEX. L. REV. 385, 395-96 (1987) (identifying several instances of settlements and their effects upon an attorney representing a class).

69. Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 884-85; Kane, *supra* note 68, at 389; *see also* Kane, *supra* note 8, at 112-14 (a named plaintiff may have only a limited interest in the litigation if, for example, the claim became moot or allegedly was only injured by one member of a defendant class).

70. Only a class representative with a large individual stake in the lawsuit is likely to have the interest and the resources to monitor the class attorney. Ironically, this class member is most likely to opt out of the class action to avoid being brought down by other class members with weaker claims. Coffee, *Rethinking the Class Action, supra* note 3, at 633-34.

71. *Id.* at 643 ("[T]he 'entrepreneurial' attorney has little desire to represent . . . an active, concerned client and, at least in theory, should prefer a more passive client less able or willing to monitor him."). A recent survey confirmed that "there [is] very little if any active attempt by lawyers to organize class members to participate in the suit or to engage in other activities complementary to the suit." Garth, Nagel & Player, *supra* note 61, at 380-81.

72. Bergman, *supra* note 67, at 247; Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 884. Moreover, even a diligent class representative may get worn out by the length of time that it takes to prosecute a class action. Bergman, *supra* note 67, at 270.

In addition, the law does not permit the representative to have complete control over the litigation. Rather, both the class attorney and the class representative are charged with being fiduciaries for the class, and the class attorney may be permitted in some cases to take steps over the objection of the named plaintiff. *See, e.g.,* Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972) (class lawyer can settle over objections of representative); Dam, *supra* note 60, at 59; Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183, 1203-04 (1982); Strickler, *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation,* 34 DE PAUL L. REV. 73, 128 (1984).

73. In a two-party breach of contract action, for instance, the plaintiff is entitled, as a remedy, to those damages that flow foreseeably from the breach. *See, e.g.,* U.C.C. §§ 2-708 to -710 (1978).

74. For discussions of the problem of class conflicts, see Garth, *supra* note 59, Rhode,

in a school desegregation case, various members of the class of black parents may favor different injunctive or settlement structures.[75] Thus, inherent in the class action is the very real potential for a conflict of interest between the class representative and some segment of the class.[76]

Finally, the role of the judge is significantly different in class litigation than in the traditional two-party lawsuit. While in the traditional lawsuit the judge plays only a passive, neutral role, the judge in the class action typically takes on a more activist role in supervising and guiding the litigation.[77] In part, judges in class actions are responding to a perceived need to protect absent class members, some of whom may have a conflict of interest with the named plaintiff or class counsel;[78] in part, the complexity of the class action may dictate a more active judicial involvement.[79] Regardless of the cause, the Supreme Court recently noted, once the class complaint is filed the district court has a "managerial responsibility."[80] Indeed, according to

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supra note 72, and Wilton, *Functional Interest Advocacy in Modern Complex Litigation,* 60 WASH. U.L.Q. 37 (1982). Professor Rhode argues that "as a practical matter, once a class is certified, the named plaintiffs generally are neither highly motivated nor well situated" to deal with conflicts in the class. Rhode, *supra* note 72, at 1203.

75. *See* Garth, *supra* note 59, at 518-19; Rhode, *supra* note 72, at 1188-89. Professor Rhode has noted:

> Dispute has centered on the relative importance of integration, financial resources, minority control, and ethnic identification in enriching school environments. Constituencies that support integration in principle have disputed its value in particular settings where extended bus rides, racial tension, or white flight seem likely concomitants of judicial redistricting. Some minority administrators, teachers, and parental organizations have opposed interdistrict remedies that would close minority schools or dilute minority control. Even class members who accept the necessity of some busing will often divide on the merits of particular desegregation plans, which involve disproportionate burdens on minority students or transportation of primary grade students.

Id. at 1189 (footnotes omitted).

76. Indeed because of this potential conflict, client control in the class action may be undesirable. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176-77 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979) (decision to appeal cannot rest entirely with either named plaintiffs or class counsel); Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 877 n.2.

77. Chayes, *The Role of the Judge, supra* note 51, at 1284; Kennedy, *supra* note 51, at 25-29. Wilton, *supra* note 74, at 40-46.

78. The lower courts have been particularly careful to protect the absent class members when the named plaintiff seeks to settle his individual claims and drop the litigation. *See supra* notes 44-45 and accompanying text.

79. There are many types of complex class actions. Typical examples include school desegregation, employment discrimination, prisoners' rights, welfare reform, antitrust, securities, and mass tort claims. *See* 3 & 4 H. NEWBERG, *supra* note 2, §§ 17-25 (collecting cases).

80. Hoffmann-La Roche Inc. v. Sperling, 110 S. Ct. 482, 486 (1989) (holding that the district court may facilitate notice to potential class members in an opt-in class). The Court further noted that "[o]ne of the most significant insights that skilled trial judges have gained

the Court this activist role is one that the judge must assume in a class action: "Because of the potential for abuse, a district court has *both the duty and broad authority* to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[81]

The small role actually played by the class representative in the prosecution of the class lawsuit is reflected in the approach taken by courts in determining whether the proposed named plaintiff is an "adequate" representative for Rule 23 certification purposes.[82] While courts pay lip service to this part of the certification decision, they spend little or no time evaluating the named plaintiff's knowledge of the claims or willingness and ability to monitor the lawsuit.[83] Instead, the courts essentially have reduced the test for adequacy to just two requirements: (1) there can be no known conflicts between the representative and the class;[84] and (2) class counsel must be competent.[85] And this second requirement, which is given at least equal weight by the courts, does not look to the class representative, but to the adequacy of the class attorney.[86]

Thus, class action practice confirms what class action doctrine has recognized only sporadically: The class lawsuit and the class representative do not function according to the traditional private-rights model. Unlike the traditional client, the class representative plays little

in recent years is the wisdom and necessity for early judicial intervention in the management of litigation." *Id.* at 487. *See* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition,* 69 CALIF. L. REV. 770 (1981) (discussing the need for activist judges in all litigation).

81. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (emphasis added).

82. FED. R. CIV. P. 23(a)(4). The Rule requires the district court to find that "the representative parties will fairly and adequately protect the interests of the class."

83. While some courts look to see whether the named plaintiff has some understanding of the class claims, others hold that simply having a "keen interest" in the litigation suffices. Bergman, *supra* note 67, at 258-59; Underwood, *supra* note 44, at 788-89. In part, courts may be recognizing that if they demand too much of the named plaintiff, no "adequate" representative will be producible and many wrongs may go unredressed. Grosberg, *Class Actions and Client-Centered Decisionmaking,* 40 SYRACUSE L. REV. 709, 737-38 (1989).

84. Some courts hold that a *potential* conflict of interest will not disqualify a class representative. 1 H. NEWBERG, *supra* note 2, § 3.25 (collecting cases); 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 2, § 1768, at 359-60.

85. Bergman, *supra* note 67, at 252-58; 1 H. NEWBERG, *supra* note 2, § 3.22 (collecting cases). This test is derived from Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds,* 417 U.S. 156 (1974), and was echoed by the Supreme Court in General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

86. One commentator has observed that "the single most important factor considered by the courts in determining the quality of the representatives' ability and willingness to advocate the cause of the class has been the caliber of the plaintiff's attorney." *Symposium on Class Actions, the Class Representative: The Problem of the Absent Plaintiffs,* 68 Nw. U.L. REV. 1133, 1136 (1974). *See* 1 H. NEWBERG, *supra* note 2, § 3.24 (collecting cases).

part in initiating or shaping the case. Instead, the class attorney controls the litigation, presenting the *class* claims; the representative provides no more than an anecdotal example of the class claim. Furthermore, unlike traditional private-rights litigation, the class action carries with it substantial risk of a conflict of interest between the class representative and some segment of the class. Because of this potential conflict and the complexity of class litigation, judges have naturally assumed, and ultimately been charged with, more activist roles than those taken in traditional litigation.

II. The Solution: Elimination of the Class Representative

Given the confused state of class action doctrine and the diluted if not nonexistent role actually played by the class representative, we must ask: Do we really need the class representative? Could the class action function, doctrinally and practically, without him? If so, what modifications to the class action rules would have to be made? In analyzing these issues, we must continually consider the skeptic's responses and, in particular, his legitimate retort: Even if the class representative serves only a modest role, what is the harm in keeping him?

A. What Does Elimination of the Class Representative Do to Class Action Doctrine?

The class representative is, in large part, simply a throwback to the traditional two-party model of litigation. The class representative, as the *named* plaintiff, makes the class action resemble the traditional lawsuit with which we are comfortable and familiar.[87] When we look to the class representative to satisfy standing and jurisdictional requirements, we are asking the representative to do what the traditional party in the nonclass lawsuit must do.[88] While this approach in some sense may make us feel comfortable, we should ask ourselves whether

87. As Professor Parker and Stone remarked in their discussion of public law litigation: "The naming of an individual as plaintiff is basically a concession to tradition." Parker & Stone, *supra* note 59, at 772.

88. Professor Sunstein argues that in the traditional private-rights lawsuit standing questions rarely arise and are easily resolved. The question of the private plaintiff's standing is simply another way of asking whether the law has created a cause of action for someone in the plaintiff's circumstances. Sunstein, *supra* note 5, at 1434. *See also* Chayes, *Foreword, supra* note 5, at 8-9 (standing issues rarely emerged because historically, in private party actions, the plaintiff's standing to sue fused with whether the plaintiff maintained a cause of action on the merits); Chayes, *The Role of the Judge, supra* note 51, at 1290 (issues of a plaintiff's standing to sue stemming from the early code pleading rules were rare since a "plaintiff's standing merged with the legal merits").

we are not simply trying to force the class action into a mold in which it will never fit.[89]

A fundamental point to recognize is that the Constitution does not mandate a traditional private-rights model of litigation.[90] Article III requires a case or controversy, but does not dictate who must be party to the case or controversy.[91] Due process requires adequacy of representation before absent class members can be bound by a judgment, but does not dictate who must provide such adequate representation.[92]

Insofar as standing and mootness issues are concerned, the *Sosna-Geraghty* line of cases demonstrates that these issues can be analyzed in class actions by focusing not on the named plaintiff but on the class and absent class members. The issue then becomes whether the class has a live, concrete claim against the defendant.[93] Quite simply, the class can provide the "concrete adverseness" and any "personal stake" needed for Article III standing purposes.[94] And as *Geraghty* illustrates, this focus on the class and virtual elimination of the class represen-

89. *See,* Chayes, *The Role of the Judge, supra* note 51, at 1291 ("I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication."); Monaghan, *supra* note 5, at 1383 ("Perhaps more than any other single development, the mushrooming of class actions has rendered the private rights model largely unintelligible.").

90. Monaghan, *supra* note 5, at 1368-72.

91. As Professor Monaghan states: "[I]n a document intended 'to endure for ages to come,' this ['case or controversy'] language [of Article III] cannot mean that we are frozen to the judicial forms and proceedings understood by the judges at Westminster." *Id.* at 1372. *See also,* Fletcher, *supra* note 5, at 248 (arguing that "who" brings the case is not part of the "case or controversy" requirement); Greenstein, *supra* note 8, at 919 (indicating a court appointed guardian *ad litem* may not necessarily have a personal stake in the controversy).

92. *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

93. *See supra* notes 4-48 and accompanying text. In his concurring opinion in Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) (the companion case to *Geraghty*), Justice Stevens argued that once a class action complaint is filed, the unnamed class members should be regarded as parties for Article III purposes. *Id.* at 342 (Stevens, J., concurring). *See also* Greenstein, *supra* note 8, at 911-15 (debating whether a class has legal status prior to certification); Note, *Class Standing and Class Representative,* 94 HARV. L. REV. 1637, 1647-50 (1981) (advocating that the putative class as a whole should be viewed as the plaintiff and as such must meet the jurisdictional requirement of showing concrete injury to present a justiciable controversy).

94. A number of commentators, in analyzing standing in general, have argued that the "personal stake" requirement is a poor way to assure vigorous advocacy and is not necessary for "concreteness" or Article III "case or controversy" purposes. *See, e.g.,* Berger, *supra* note 59, at 817-29; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033, 1034-40 (1968); Monaghan, *supra,* note 5, at 1370; Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U.L. REV. 881, 891 (1983); Sunstein, *supra* note 5, at 1474; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer,* 93 HARV. L. REV. 1698, 1706-09 (1980). In addition, some commentators contend that in public interest litigation, a traditional plaintiff,

tative is possible in both the precertification and postcertification settings. In addition, these decisions show that the absent class members can be "adequately represented" and protected for due process purposes before and after certification even though the named plaintiff no longer has a personal stake in the controversy. Regardless of when a standing or mootness issue arises, these concerns can be analyzed by asking: Does the class have a live, concrete claim? Has the issue become moot for the class?[95] Is someone protecting the class's interest?

Indeed, the lower court cases reinforce the feasibility of focusing on the class and absent class members in the standing and mootness area.[96] While the case law is anything but consistent, some lower courts have recognized that standing and mootness issues in three major areas of class action jurisprudence—precertification mootness, post-trial inadequacy, and precertification settlement—can be resolved by using a *Sosna-Geraghty,* class-oriented approach. In doing so, the peculiar circumstances of the named plaintiff are largely ignored, and the focus shifts to the interests of the absent class members and the harm they may suffer if the action is dismissed or settled.

Our skeptic responds: The *Sosna-Geraghty* line of cases and the lower court cases following their approach only show that from a doctrinal viewpoint we can handle standing and mootness issues without a class representative. What about class action doctrine outside the standing and mootness area? Don't we need a class representative there?

The answer is yes and no. In some areas, the class action doctrine already focuses on the class, and eliminating the class representative would have no effect. For instance, since each class member, including absent ones, must meet the amount-in-controversy requirement, the class representative has no special role in this regard.[97] Similarly, the absent class members are protected for statute of limitations purposes from the time the class complaint is filed.[98]

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with his own individual claim, is not constitutionally required. *See, e.g.,* Berger, *supra* note 59, at 840; Jaffe, *supra,* at 1033-34; Parker & Stone, *supra* note 59, at 775.

95. When the issue has become moot for all or a substantial portion of the class, a dismissal for mootness would be appropriate. This was the situation in Kremens v. Bartley, 431 U.S. 119 (1977), in which a class action challenged state commitment procedures for mentally ill juveniles; the state promulgated new regulations before class certification and enacted an entirely new statute after the class had been certified. *Id.* at 122-27. The Court held that in such a case, when the claim was mooted for the entire class or a substantial portion of the class, the entire case was moot despite certification. *Id.* at 129. Under my proposal, *Kremens* would remain good law.

96. *See supra* notes 34-47 and accompanying text.

97. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973).

98. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). Additionally, United

In other areas—most notably diversity jurisdiction, personal jurisdiction, and exhaustion of some administrative remedies—some modification of current class action doctrine would be necessary if we eliminated the class representative. Currently, the courts look primarily to the class representative to satisfy these requirements.[99] While this appears to give the named plaintiff an important role, in actuality the courts are saying that these requirements are met if any member of the class can satisfy them. The only trick is finding that class member and giving him the title "class representative." The same result could be achieved without a class representative by asking the question directly: Is there any member of the class who can satisfy these requirements?

B. What Does Elimination of the Class Representative Do to Class Action Practice?

The short answer is that elimination of the class representative would have only a negligible effect on class action practice. In practice, the class representative plays a very minor role. The class attorney fashions the claim, decides on strategy, presents the evidence, and represents the interests of the class.[100]

C. What is the Advantage in Eliminating the Class Representative?

At this point our skeptic is saying: All right, suppose doctrinally and practically we do not technically "need" a class representative. The class representative may be a throwback to the traditional model of litigation, but what do we gain by eliminating him?

Eliminating the class representative would result in less confusion and inconsistency in class action doctrine. With the current coexistence of both the *Jacobs* and *Sosna-Geraghty* lines of cases, the role of the class representative has taken on a "now you see it, now you don't" aura. By embracing the *Sosna-Geraghty* approach and taking it to its logical conclusion—the elimination of the class representative—we can begin to develop a coherent, unified class action jurisprudence.

The skeptic replies: If you want logical consistency, why not keep the class representative and eliminate the *Sosna-Geraghty* approach?

Airlines v. McDonald, 432 U.S. 385 (1977), gives the absent "class member" of an uncertified class the right to intervene in order to appeal the denial of class certification.

99. *See supra* note 28 and accompanying text.

100. *See supra* notes 49-86 and accompanying text.

Would not keeping the class representative and the *Jacobs* approach be less disruptive than your proposal?

Admittedly, for purposes of logical consistency, which of the two approaches is chosen is less important than the fact that one is chosen. The advantage, however, of the *Sosna-Geraghty* approach is that it recognizes that class litigation does not fit within the traditional litigation model. Keeping the class representative is more than a harmless throwback to the traditional bipolar model of litigation; it is, as Professor Parker and Stone have stated, a "costly anachronism."[101] The costs are two-fold.[102] First, the naming of a class representative may divert the court's attention from the real problems associated with class litigation. It may lull a court into believing that, as in a traditional lawsuit, the named plaintiff has meaningful client control over the class attorney. It also may foster the illusion that the class is unified and represented in some democratic sense by the class representative.[103] Neither scenario is likely to be true. The class representative is at best a volunteer, and at worst a solicited puppet of the class lawyer. Moreover, there may be conflicts within the class, and the "representative" may not represent the interests of the entire class at all points in the lawsuit. Yet the illusion of a traditional lawsuit created by the class representative may keep the court from focusing on these problems and obscure the reality of the class action: that it is fundamentally litigation by and for a *group* and thus operates differently from the traditional two-party lawsuit.[104]

Without the class representative, the court's focus in a class action properly will shift to the class. And without the illusion of a traditional lawsuit, there is a greater chance that courts will recognize that the doctrines developed in the traditional nonclass cases cannot be simply transplanted into the class action. Instead, courts might begin the long

101. Parker & Stone, *supra* note 59, at 772.

102. *See id.* at 780-81 (arguing that the application of the traditional standing doctrine in public law litigation imposes similar costs upon the remediation process).

103. As Professor Chayes noted, the tendency to force the class action into the mold of the bipolar lawsuit and the unexamined assumption that the named plaintiff is in control of the lawsuit may lead a court to assume unity within the class and divert the court's attention from the real need for effective communication between the class attorney and class members. Chayes, *Foreword, supra* note 5, at 37, 45. Wilton echoes the same thought. Wilton, *supra* note 74, at 48-52.

104. As Professor Coffee explains, "the choice is between truth and illusion. We [can] continue to pretend that the class representative is the true party in interest, or we [can] recognize the reality of the attorney as entrepreneur." Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 899. Professor Hutchinson argues that we should retain the class representative because doing so "rejects the reality" of the class lawyer as the real party in interest. Hutchinson, *supra* note 27, at 502. My proposal, unlike Hutchinson's, comes down firmly on the side of reality and the need to deal directly with that reality.

overdue task of constructing a class action jurisprudence specifically tailored to address the peculiar problems of class litigation. Courts might focus directly on questions such as: Under what circumstances should we permit a class action to be brought or continued? How can we assure that there will be some meaningful supervision of the class lawyer? How can we increase the likelihood that conflicts within the class will be brought to the court's attention? How should we handle settlements by less than all members of the class?

The existence of the class representative not only masks these real problems, it also wastes judicial and lawyer resources on phantom issues. Currently, courts spend an inordinate amount of time grappling with what are often hair-splitting questions: Does the named plaintiff's changed circumstances destroy his "personal stake" in the litigation?[105] Does the named plaintiff continue to have a "live" claim?[106] If not, has the case proceeded far enough for the class's personal stake to take over?[107] Is the claim one that is capable of repetition for the

105. Chayes, *Foreword, supra* note 5, at 45. The "personal stake" required of a plaintiff has become so diluted through the years that, as Professor Monaghan remarked, "the most trivial interest will suffice." Monaghan, *supra* note 5, at 1382. *See also* Nichol, *supra* note 5, at 75 (discussing the "liberalization" of the injury-in-fact standard to include intangible and subjective claims as well as abstract and widely-shared claims).

106. If the court finds that the named plaintiff has a "live" issue, the court can avoid dismissing the case. Courts therefore will search to find such an interest. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (class representatives who had been paid the full amounts of their claims continued to have "personal stakes" in the class certification issues because they might be able to shift some litigation costs to the class if they prevailed). *See also* McKinnon v. Talladega County, 745 F.2d 1360, 1362 (11th Cir. 1984) (A claim for money damages alleging certain conditions in a county jail is not moot because the class representative was transferred from the jail.); Jordon v. County of Los Angeles, 669 F.2d 1311, 1316 (9th Cir.), *vacated on other grounds,* 459 U.S. 810 (1982) (In an employment discrimination case, a settlement agreement entered into by the named plaintiff in the absence of a certified class did not render the action moot. "[T]he attempt by several members of the putative class to intervene as party plaintiffs clearly demonstrates the existence of a live controversy.").

A related question that has consumed considerable time and effort of courts is what to do with a named plaintiff who loses on his individual claim after class certification has been denied. Can he still be the class representative for purposes of appealing the denial of class certification? If not, what is the district court's duty in helping to find a new representative? *See* Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability,* 1984 B.Y.U. L. REV. 1, 40-51 (collecting cases).

107. There seems to be no end to the questions that can arise in this area. *See, e.g.*, Reed v. Bowen, 849 F.2d 1307, 1313-14 (10th Cir. 1988) (The question was whether, in the case of precertification mootness, the class lawyer may engage in discovery to find a new class representative. The court held that it could not because without a "live" named plaintiff, there was no case.); Trotter v. Klincar, 748 F.2d 1177, 1183-84 (7th Cir. 1984) (the issue was whether *Gerstein* applied when the class claim was inherently transitory and capable of repetition for the class, but the named plaintiff's individual claim was declared moot before he moved

class, yet likely to evade review?[108] Analyzing such issues takes substantial judicial and lawyer resources, but does nothing to answer the real question: Is there a concrete, class-wide claim that the class wants decided?[109] By eliminating the class representative, we also eliminate the galaxy of phantom issues that his presence as the "named plaintiff" engenders[110] and achieve some much-needed judicial economy.[111]

D. What Changes Would Be Required to Enact this Proposal?

Our skeptic now smiles and says: Even if we do not "need" a class representative, and even if there might be some advantages to eliminating him, you are just theorizing. Would not your proposal, if actually carried out, require a massive rewriting of Rule 23?

Eliminating the class representative admittedly would require some changes in the certification procedure and in the evaluation of stand-

for class certification; the court held that *Gerstein* did not apply). *But cf.* Hoffmann-La Roche v. Sperling, 110 S. Ct. 482, 486-88 (1989) (a district court may facilitate the identification of and notice to class members of an opt-in class, even though they are not "parties" to any "case" until and unless they do opt in).

108. 1 H. NEWBERG, *supra* note 2, § 2.19 (collecting cases). As Professor Greenstein has remarked, it is not at all clear how "repetition and evasion" enhance or create Article III jurisdiction. Greenstein, *supra* note 8, at 903. The answer to the traditional Article III question—whether the class representative has a personal stake in the outcome of the case—in no way changes because the claim is capable of repetition, yet evading review. If the class can provide the personal stake for Article III purposes only after certification, then logically, before-certification mootness of the representative's claim should demand dismissal of the action, regardless of any repetition or evasion claim.

109. In *Geraghty,* the Supreme Court framed the question as follows: Is there a "sharply presented issue[] in a concrete factual setting and self-interested parties vigorously advocating opposing positions[?]" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980).

110. In light of *Gerstein* and *Geraghty,* there is a real question whether the insistence on a class representative with a "live" claim serves any function other than eliminating some class actions that courts find "undesirable" on the merits. Put another way, decisions on standing easily can become concealed decisions on the merits. By using standing to disguise decisions on the merits of the claim, however, we permit the lower court to dismiss the class claim without explaining what is substantively lacking from the allegations, and we largely insulate the lower court's decision from reversal on appeal. *See* Tushnet, *supra* note 5, at 663-64 (arguing that many standing decisions in general have become concealed decisions on the merits).

111. Moreover, lawyers no longer would have to go through the formalism of substituting one named plaintiff for another whenever mootness questions arose or even worse, bringing duplicative lawsuits. The unnecessary and ultimately meaningless expenditure of time and effort is illustrated by Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Supreme Court applied the traditional standing approach to a representative action and held that the Sierra Club lacked standing because the club had alleged no direct injury to itself or its members. After years of litigation regarding the club's "personal stake" in the lawsuit, the club was allowed to amend its complaint to add additional parties who did have standing. Sierra Club v. Morton, 348 F. Supp. 219, 220 (N.D. Cal. 1972).

ing, mootness, and certain jurisdictional issues. These changes, however, could be accommodated with relatively modest adjustments to the existing class action procedures.

First, without a class representative, the action would be brought in the name of the class. All standing questions would merge into the class certification issue.[112] Instead of resolving standing issues by looking at the particular circumstances of one class member, the district court would ask the more fundamental question: Is there a sharply defined issue presented in a concrete factual setting that the parties want resolved? To answer this question, the district court would inquire whether there was a class of persons who have a personal stake in this issue and who would want this issue decided. In addressing these questions, the court would necessarily be handling the class certification issue under Rule 23.[113] The court would inquire whether the class claim truly was common to the "class" being proposed[114] and whether there was a sufficient number of persons in that class to justify the use of the class action procedure.[115]

In addition, the district court would continue, as under existing Rule 23, to ascertain whether the proposed action falls within one of the three categories described in Rule 23(b).[116] In particular, if a Rule

112. *See* Fletcher, *supra* note 5, at 236-39 (arguing that in all cases standing considerations should be seen as part of the decision on the merits). *See also,* Parker & Stone, *supra* note 59, at 774-75 (arguing that standing should not be treated simply as a threshold requirement but should be considered with the merits and particularly at the remedial stage of the litigation).

113. Some commentators have argued that the present certification procedure is flawed and in need of change. *See* Berry, *supra* note 64, at 302-06; Greenstein, *supra* note 8, at 908-09.

114. To the extent that General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155-57 (1982), requires that there be a class claim, as opposed to an individual instance of discrimination, it would remain good law.

115. Rule 23(a) currently sets forth the threshold requirements that any action must meet in order to be certified as a class action. It provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Under my proposal, inquiries (1) and (2) would still be made. Inquiries (3) and (4) would be eliminated in their present form.

116. In addition to meeting the Rule 23(a) prerequisites, a purported class action also must meet the requirements of one of the three (b) subcategories. Rule 23(b)(1) authorizes a class action when necessary to prevent possible adverse effects on absent class members or the party opposing the class that might arise if individual lawsuits were prosecuted. Rule 23(b)(2) permits class actions when the party opposing the class has acted in a way that affects all class members in a similar way and injunctive or declaratory relief is sought for the class. Rule

23(b)(3) class were being proposed, the court also would inquire into such matters as the interests of individual class members in bringing separate actions, the status of any individual actions already filed, the desirability of combining all litigation into one forum, and the management problems likely to be encountered in a class action.[117] The only questions deleted from the inquiry would be those directed to the class representative.[118]

But how, our skeptic asks, will a district court be certain that the proposed class claim is concrete? If he does nothing else, the class representative assures the court that it is not deciding an abstract and theoretical question. Without a class representative, the class attorney becomes a roving ideological plaintiff, free to interfere in matters that do not concern him and about which those directly affected have not complained.[119]

While concreteness is certainly a valid concern, it can be assured without resurrecting the class representative.[120] Specifically, it can be assured by requiring that the class attorney present to the district court some "exemplary class members" during the certification process.

23(b)(3) authorizes a class action when common questions predominate and the class action is superior to other available methods for resolving the dispute.

117. Rule 23(b)(3) provides that an action meeting the 23(a) requirements may be maintained as a class action if, in addition:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id. 23(b)(3). Under my proposal, all the Rule 23(b)(3) inquiries would be made.

118. Specifically, Rule 23(a)(3) and (4) would be dropped (or at least restructured).

119. Professor Brilmayer argues that the requirement of a traditional personal-stake plaintiff in public interest litigation insures that the courts are not interfering in a matter about which no one is complaining. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310-15 (1979). *See also* Floyd, *The Justiciability Decisions of the Berger Court*, 60 NOTRE DAME L. REV. 862, 909 (1985) (the Burger Court refused to stray from the traditional plaintiff "concrete adverseness" theory by allowing a public interest organization to bring suit based upon advocacy interests); Sunstein, *supra* note 5, at 1462 (the Administrative Procedure Act requirement of injury-in-fact further deters the possibility of outsiders "disrupt[ing] mutually benefitial arrangements").

120. Some commentators argue that the roving ideological plaintiff is a fiction. *See, e.g.*, Parker & Stone, *supra* note 59, at 775 (courts have no standards for assessing which plaintiff is most representative of the affected class); Scott, *supra* note 5, at 674 ("The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.").

These exemplary class members would demonstrate that: (1) the class issue presented in the complaint indeed had arisen in specific, concrete instances; (2) there are class members who want the issue resolved; and (3) there are class members who can fulfill any necessary jurisdictional or administrative requirements. Moreover, the district court could adjust the number of exemplary class members required to match the complexity and breadth of the claims in the particular case.[121] The exemplary class members, however, would not be named plaintiffs, and the fate of the action would not depend on the continued vitality of their particular claims.[122]

Our skeptic may ask about supervision of the class attorney. Is it not likely that some class representatives provide some monitoring of the class attorney, and is this not beneficial? Indeed, we do not permit the class attorney to be the class representative precisely to avoid giving the class attorney undue control over the class lawsuit.[123]

The answer is again yes and no. Yes, we want someone to monitor and supervise the class attorney. But no, the class representative does

121. Our skeptic may ask: Is there not a separation of powers problem with your proposal? Should not courts limit themselves to protecting individual rights rather than general social interests? And in the class action, does the existence of the class representative not insure that the court is so limiting itself? My response is that my proposal raises no separation of powers problems. In reviewing the claims of the exemplary class members, the district court could assure itself that there were individuals who had suffered concrete injury and that the claim was capable of resolution by the courts. *See* Parker & Stone, *supra* note 59, at 782 (separation of powers can be guarded by denying relief to persons whose relationships to the case are deemed insufficient); Scalia, *supra* note 94, at 891 (arguing that standing requirements are not meant to insure separation of powers but rather are meant to insure that someone with a "concrete injury" is objecting to the law or practice); Sunstein, *supra* note 5, at 1469-71 (separation of powers doctrine not intended to limit courts' protection to traditional or individual rights).

Similarly, elimination of the class representative would not raise the specter of unconstitutional "advisory opinions." As Professor Berger has pointed out, the advisory opinion doctrine is meant to avoid advice to Congress *before* it acts; it does not dictate who must bring the lawsuit after Congress has acted. Berger, *supra* note 59, at 816, 830-31; *see also,* Fletcher, *supra* note 5, at 247; Monaghan, *supra* note 5, at 1373-74 (to avoid advisory opinions it is only necessary to require that "petitioner present relevant facts in sufficiently concrete form"); Nichol, *supra* note 5, at 99-101 (The "political question" doctrine looks to the issue being raised, not to the party raising it and is therefore separate from standing issues.). In any case, because my proposal focuses on the *class's* stake and its requirement of exemplary class members, there would be no threat of courts handing out advisory opinions.

122. If the individual claims of all exemplary members became moot, class counsel would have to present new exemplary members to assure the court that the issue remained "alive" for the class.

123. A particular concern is that the class attorney will sell out the class by agreeing to a small damage recovery in return for a large fee. *See* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1089-92 (3d Cir.), *cert. denied,* 429 U.S. 830 (1976); Bergman, *supra* note 67, at 249; Rock, *Class Action Counsel as Named Plaintiff: Double Trouble,* 56 FORDHAM L. REV. 111, 117-20 (1987); Underwood, *supra* note 44, at 791.

not effectively achieve this monitoring. The class representative, often chosen by the class attorney, typically does not have either the ability or the inclination to monitor the class lawyer in any effective way.

A better approach would be to move away from the class representative and deal directly with the problem at hand: how to assure meaningful supervision of the class attorney given the financial realities of the class suit. Under my proposal, the district court would require that the class attorney present to the court "class monitors" as part of the class certification process.[124] The job of these monitors would be to supervise the activities of the class lawyer during the various stages of litigation. These class monitors need not be members of the class, and therefore need not be the same persons who are presented as exemplary class members.[125] In many cases, the most effective monitor may be a nonmember organization with a special interest in the subject matter of the lawsuit.[126] Whether a class member or not, the class monitor should possess certain key qualities such as the time and sophistication (including knowledge of the economic realities and substantive merits of the claims) to supervise actively the class attorney in the planning and decision-making involved in the lawsuit.

In reviewing the adequacy of the class monitors, the district court would look specifically at their ability to monitor the class lawyer. Furthermore, as with the exemplary class members, the district court could vary the number of class monitors required to suit the complexity of the case or the stage of litigation.[127] In particular, the district court could require that the class monitors be changed or increased as the case progressed, replacing bored monitors and adding class members with differing interests.[128]

124. I apologize for the label. I realize that the name "class monitor" sounds like someone who cleans erasers in grammar school.

125. The suggestion that nonclass members be appointed as monitors is not as far-fetched as it might sound at first. More than one commentator has noted that nonclass organizations might successfully be used to monitor the class lawyer. Chayes, *Forward, supra* note 5 at 45; Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 900.

126. As a number of commentators have observed, the best monitors of class lawyers often are organizations who are not class members, but who have an ongoing interest in the litigation. Unlike many private individuals, they often have the sophistication and financial resources to supervise a lawsuit over many years. *See, e.g.*, Scott, *supra* note 5, at 680-81; Sunstein, *supra* note 5, at 1448; Tushnet, *supra* note 94, at 1710-13 (discussing public interest litigation).

127. The requirement that the class attorney present exemplary class members and class monitors at the certification stage (and increase or change them as the district court deems necessary) avoids Professor Brilmayer's concern that dispensing with the traditional plaintiff requirement will encourage the attorney to cut corners. Brilmayer, *A Reply*, 93 HARV. L. REV. 1727, 1729-31 (1980).

128. Other commentators have noted that adequate representation (adequate class monitors,

At this point, our skeptic may argue that my proposal is nothing more than a shell game. It purports to eliminate the class representative, but in reality simply replaces him with "exemplary class members" and "class monitors." If the class lawyer must come forward with exemplary class members and class monitors, why not just name these people as class representatives?[129] Or, if lawyer supervision is a problem, why not keep the class representative and just have the district court place more emphasis on his monitoring duties as part of certification?[130]

The benefit in this proposal goes far beyond a change in labels.[131] The benefit lies in unmasking some of the illusions fostered by the existence of a class representative. On a doctrinal level, elimination of the class representative takes us away from the notions that the class action is brought and prosecuted by one person, that there is a single "named plaintiff," or that the fate of a group's action rises and falls with the fortunes of one individual. Although my proposal would add

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under my proposal) is particularly important at the remedial stage of the class action. At the remedy stage, the court often is faced with more than a liability decision in favor of or against the plaintiff class. The court may well have to choose a remedy from among a number of possible plans that could be designed to fit within the constitutional or statutory language. Or, the court may be asked to approve a negotiated settlement in which the plaintiffs' and defendants' counsel have fashioned a remedy. In either case, each of the different possible remedial plans may have supporters among the affected class members, and therefore representation at the bargaining table for each such subgroup within the class becomes critical. *See supra* notes 73-76 and accompanying text. *See, e.g.,* Parker & Stone, *supra* note 59, at 772; Rhode, *supra* note 72, at 1188-89; Wilton, *supra* note 74, at 46-47. Furthermore, it is a reality of life that given the duration of some class actions, monitors likely will become bored and seek to be replaced. "All this occurs quite naturally because of the nature of class actions themselves: they tend to be lengthy, procedurally complex and legally esoteric." Bergman, *supra* note 67, at 247.

129. Professor Brilmayer raises this question in discussing the requirement for a traditional plaintiff in public interest litigation. Brilmayer, *supra* note 127, at 1727-29.

130. Actually very few commentators propose increased scrutiny of the class representative. Most recognize that the class representative has neither the ability nor motivation to supervise the class counsel. Some commentators suggest that the district court scrutinize the conduct of the class counsel more carefully. *See, e.g.,* Grosberg, *supra* note 83, at 751; Kane, *supra* note 68, at 402-03. Some commentators have explored the possibility of using surveys of absent class members or "town meetings" as means to insure that conflicting views within the class are brought to class counsel's attention. *See, e.g.,* Garth, *supra* note 59, at 515-18; Rhode, *supra* note 72, at 1232-42; Wilton, *supra* note 74, at 66. Professor Coffee, who maintains that only a representative with a large personal stake ever will monitor the class lawyer, suggests that the court could limit the large claimant's right to opt out of the class. Coffee, *The Regulation of Entrepreneurial Litigation, supra* note 58, at 925-30. *See also* Ratliff, *Offensive Collateral Estoppel and the Option Effect,* 67 TEX. L. REV. 63, 69 (1988) (discussing proposals to limit opt-outs to maximize res judicata effect of class actions).

131. Eliminating the "class representative" label itself may be advantageous in that the label is somewhat misleading. The "representative" may not always represent the interests of all members of the class.

exemplary class members and class monitors, these entities would not be presented individually as bringing the action. At most, they would be members of the class prosecuting the action.

On a practical level, eliminating the class representative lessens the likelihood that the district court will treat the class litigation simply as a large traditional lawsuit. By replacing the class representative with exemplary class members and class monitors, we encourage the district court to deal directly with the peculiar problems posed by the class action: Have the parties presented a class-wide issue? Is there someone monitoring the class lawyer as he prosecutes this action? Are conflicting views within the class being heard by the class lawyer and the court?[132] In short, without the class representative, there is less likelihood the court will presume the existence of such factors as client control, unity of interest within the class, and representation of all views within the class when the class attorney speaks.

Additionally, use of exemplary class members and class monitors who are not "named plaintiffs" may give the district court a greater sense of flexibility. Should the "concreteness" of any aspect of the class claim become less certain as the suit progresses, the court can require additional exemplary class members. If the court at any time becomes dissatisfied with the attorney supervision or concerned about class conflicts, it can require additional or different monitors. And by not limiting class monitors to class members, the district court has a significantly better chance of getting adequate monitors. Under existing Rule 23, a court can request that additional or different class representatives be named during the pendency of the action.[133] Two problems, however, hinder the use of this procedure under the existing rules. First, any such substitute named plaintiff must intervene as a party, and there may be a problem in meeting the requirements of Rule 24.[134] Second, insofar as the existing class representative is *presently* inadequate, the party opposing the class can argue that absent an existing adequate representative, there can be no class and the entire action must be dismissed. In other words, without a currently valid class representative, no "class" can exist awaiting the appointment of a new representative.[135] Under my proposal when the class monitors

132. Professor Coffee argues that class conflicts often do not surface partly because lawyers "so totally dominate the process." Coffee, *Rethinking the Class Action, supra* note 3, at 656.

133. Rule 23(d)(3) permits the court to issue orders "imposing conditions on the representative parties or on intervenors," and Rule 23(d)(5) authorizes orders "dealing with similar procedural matters."

134. *See* FED. R. CIV. P. 24; *see, e.g.,* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

135. *See, e.g.,* Trevino v. Holly Sugar Corp., 811 F.2d 896, 906 (5th Cir. 1987) (when representative loses her individual case on the merits, no class can be certified, even if the

are not parties to the lawsuit and the class is the real party in interest, neither of these problems arise.

E. Odds and Ends

Our skeptic now says: Maybe your proposal would take care of major concerns like standing, mootness, and attorney supervision, but there are still some other details to cover.

What do we do about discovery, particularly prior to class certification? Traditionally, the defendant has been permitted discovery with respect to the claims of the class representative.[136] The answer is that discovery before or after certification should be permitted against the exemplary class members proffered by the class attorney. Indeed, this approach has an advantage for the party seeking discovery in that the district court can vary the number of exemplary class members required with the breadth and complexity of the class claims.

What do we do, our skeptic asks, with disgruntled class members? Under the present system they can move to intervene as plaintiffs in the class action. If we eliminate the individual plaintiffs from the class action, how do we assure that disgruntled class members, who do not opt out of the class, are protected? The answer lies within the system of class monitors. Any unsatisfied class member could petition the court to be appointed a class monitor and to have his own attorney kept informed of developments in the litigation.[137]

What about the additional burden placed on the district court by requiring it to appoint and review exemplary class members and class monitors?[138] What happened to the judge as neutral arbiter? The short

original denial of class certification was erroneous); Roby v. St. Louis S.W. Ry., 775 F.2d 959, 961-63 (8th Cir. 1985) (district court properly decertified class after trial indicated that named plaintiffs were not subject to employment practices being challenged). *But cf.* Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 616-18 (5th Cir. 1983) (when class is successful at trial but class representative is not, class does not have to be decertified); Goodman v. Schlesinger, 584 F.2d 1325, 1332-33 (4th Cir. 1978) (suggesting that when named plaintiff loses his individual case, district court can "hold" case to see if a new representative comes forward).

136. Currently, discovery is permitted against the class representative because he is "the named plaintiff" in the action. 2 H. NEWBERG, *supra* note 2, § 7.08. A more difficult question under the existing law is whether the defendant is entitled to discovery against absent class members. Here courts again get tangled up in abstract questions: Are the absent class members also "parties" to the action? Does certification of the class change the answer? For a discussion of how courts currently resolve these issues, see Underwood, *supra* note 44, at 825-26, and 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 2, § 1796.1.

137. Professors Steinman and Wilton contend that the right of the absent class member under the existing Rule 23 to intervene is a little-used right. Steinman, *supra* note 48, at 1203-06; Wilton, *supra* note 74, at 58-60. The skeptic's concern over maintaining the absent class member's right to intervene may be a concern more for a theoretical right than for a right actually used in practice.

138. Our skeptic also might ask: Won't finding these exemplary members and class monitors

answer here is that this ship has long since sailed. The growing trend in class action litigation for some time has been close judicial management.[139] As the Supreme Court has noted, given the potential for abuse and conflict in class litigation and the complexity of these cases, the district court has not only the authority, but also the duty, to exercise active control.[140] The simple fact is that the class action is not traditional litigation; the peculiar problems that arise in group litigation require the court to take an active supervisory role.

III. Summary of Proposal

In sum, I propose to eliminate the class representative and treat the class as the real party to a class action from the time the complaint is filed. The class complaint now would name the class as the party bringing the lawsuit, not an individual purporting to represent the class. All standing and mootness questions, before and after class certification, would become: Does the class have standing to assert this claim? Has this claim become moot for the class or a sizable part of the class?

Moreover, the standing issue would merge into the class certification question. As part of deciding whether the class has standing to assert the claim, the district court naturally would have to decide whether there was a class of persons for whom this was a live and concrete issue and whether the number of persons in that class was sufficiently large to justify the use of the class procedure. In addition,

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likely involve a good deal of communication between class counsel and members of the class, possibly resulting in targeted solicitation by the class lawyer? There may well be increased communication between the class and the class lawyer. As evidenced by Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), however, not all communication between class counsel and the class membership is prohibited. Indeed, as many commentators have pointed out, increased communication with the class could be advantageous because both counsel and the court would be more likely to discover conflicts within the class. Garth, *supra* note 59, at 533-34; Grosberg, *supra* note 83, at 751; Wilton, *supra* note 74, at 66. With respect to the charge of solicitation, my response is that attorneys currently engage in solicitation. *See supra* note 61 and accompanying text. Moreover, the Supreme Court has been relaxing its position toward solicitation. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 639-47 (1985); *Gulf Oil*, 452 U.S. 89; Camisa, *The Constitutional Right to Solicit Potential Class Members in a Class Action*, 25 GONZ. L. REV. 95 (1989-90) (discussing *Gulf Oil* and *Zauderer*). Solicitation may even be desirable in a class action as one way of informing potential claimants of their rights. Rhode, *supra* note 62, at 325.

139. *See supra* notes 77-80 and accompanying text. *See also* Garth, *supra* note 59, at 515-18 (asserting that "the trial court has a *duty* to uncover conflict and to handle it creatively"); Kane, *supra* note 68, at 402-03 (arguing that active judicial involvement is necessary in a class action to discover conflicts within the class and to assure adequate monitoring of the class counsel).

140. Hoffmann-La Roche Inc. v. Sperling, 110 S. Ct. 482, 486-87 (1989); *Gulf Oil*, 452 U.S. at 100.

in a Rule 23(b)(3) class proceeding, the court would continue to decide, as it currently does, whether the common class issue predominates over individual issues and whether the class procedure is superior to other methods of adjudicating the issue. Any inquiry into the adequacy of a class representative or comparison of the representative's claims with the class claims (i.e., the inquiries of Rule 23(a)(3) and (4)) would be eliminated.[141]

Instead, the class attorney would be required to present exemplary class members and class monitors as part of the certification process. Exemplary class members would assure the district court that the class issue presented in the complaint actually has arisen in real, concrete instances and that members of the class want the issue resolved. In addition, exemplary members would take the place of the class representative for determining satisfaction of personal jurisdiction, diversity of citizenship, and exhaustion of administrative remedies. Rather than looking to one class representative to satisfy these jurisdictional requirements, class counsel would present exemplary members to show that some member of the class could satisfy any needed administrative or procedural requirement.

The class monitors, who would not necessarily be the same persons as the exemplary class members and might not even be class members, would have the job of monitoring the class attorney. The burden would be on the class to show that the proposed monitors were willing and able to take on such a supervisory role. The district court would have the authority to vary the number of exemplary class members and class monitors required depending on the scope and complexity of the case. In addition, the district court would be encouraged to review the exemplary members and monitors as the case progressed to ensure that there was continuing supervision of class counsel and that conflicting interests within the class were being heard. Provided the monitors were adequate, the class would be bound by the outcome of the lawsuit.

Discovery would be directed at the exemplary class members; the district court would have the authority to require the addition of exemplary class members if necessary for adequate discovery. No changes would be made in the existing procedures for giving notice to the class,[142]

141. Alternatively, the inquiries in Rule 23(a)(3) and (4) can be seen as being redirected at the exemplary class members and the class monitors, respectively. The exemplary class members will have to show that the controversy is a real, concrete issue, and the monitors will have to show that they can protect the class in supervising class counsel.

142. Although no change would be made in the procedure for giving notice to the class, my proposal would acknowledge openly another reality of current class action practice: class

for opt-outs and opt-ins,[143] or for counterclaims against the class members.[144] Any disgruntled class member who chose not to, or could not opt out of the class, could petition to be added as a class monitor.

Conclusion

The time has come to think about the unthinkable: eliminating the class representative. He serves no function in the actual prosecution of the class action. Yet his presence engenders confusion and the proliferation of phantom issues in class action jurisprudence. Furthermore, having a named plaintiff tends to obscure the fundamentally nontraditional nature of the class action and to divert courts from addressing directly the peculiar problems inherent in group litigation. My proposal, with its use of exemplary class members and class monitors, would help resolve these problems with minimal disruption of class action doctrine and practice.

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counsel advances the cost of notice to the class with recovery of the advanced amount dependent upon the success of the action. Currently, some courts inquire into the ability of the class representative to pay these costs as part of the class certification process. Berry, *supra* note 64, at 310-11; Underwood, *supra* note 44, at 804-08. In reality, however, these costs typically are advanced by class counsel and recovered from the class only if it succeeds in the litigation. *See* authorities cited *supra* note 67. Furthermore, insistence on payment of costs by the class representative serves only to make the class action impractical for the small claimant, the very person the class action was meant to serve. Berry, *supra* note 64, at 311.

143. In most Rule 23(b)(3) actions, absent class members have the right to opt out of the class, and if they do so, they are not bound by the judgment in the action. Absent such an option out, all class members are bound by the judgment in the class lawsuit. *See* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 2, § 1787, at 209-13; *see also* Weber, *supra* note 59, at 385-87 (arguing that the "opt out" right should also be available for absent members of a (b)(2) class). A few substantive statutes, however, provide that absent class members must opt into the (b)(3) class in order to be bound by the judgment. *See, e.g.*, Hoffman-La Roche, Inc. v. Sperling, 110 S. Ct. 482 (1989) (discussing the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602). Under my proposal, both the general opt-out rule and any statutorily-mandated opt-in rule would remain the same.

144. Occasionally, a defendant will assert a counterclaim against absent class members. Courts differ on how to handle those counterclaims. Steinman, *supra* note 48, at 1175-79. Regardless of the procedure a court uses when faced with counterclaims, the elimination of the named plaintiff will not affect such procedures. As Professor Steinman notes, the class representative never does "represent" the absent class members with respect to counterclaims filed against the class members. *Id.* at 1190-91.